

A Constitution of Fear

Tomasz Tadeusz Koncewicz Do 16 Nov 2017

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When electoral mandates and constitutional/legal change are used in the service of an illiberal agenda, I call this phenomenon „autocratic legalism”

K. L. Scheppele, Autocratic legalism, University of Chicago Law Review (forthcoming)

The constitutional manifesto of the Polish authoritarians is well known and might be conveniently summarised as follows: There is one culprit behind the alleged Polish enslavement by the EU and rampant injustice that has defined Poland post-1989. It is the Constitution of 1997, written for and by the new post-solidarity elites that have seamlessly mingled with the ex-communists to oppress hard-working true Poles. This Constitution is a source of our predicament because this is not the true Polish Constitution. Rather it is a document that betrays Polish history, belittles Poles and falls way short of capturing the true and prideful Polish spirit. We are now told that a new constitution is needed to finally liberate us from the corrupt past and fake state that was never for real. Yet despite all the historical inaccuracies (to put it mildly) and [paranoias](#), Polish populist constitutionalism deserves to be taken seriously. It is not the result of some aberrant detour or momentary bout of rage. Rather it is a complete and comprehensive constitutional project based on new constitutional design, new characters, plots and themes. When completed, it would have a transformative effect on the Polish constitutional landscape and crown the unconstitutional capture that has engulfed Poland since 2015. The „new constitutionalism” was succinctly and ominously summarized by the honorary Marshal of Polish Sejm: „[It is the will of the people, not the law that counts](#)”. When the law does not serve the interests of the people, it is always the latter that will prevail. Such understanding leads to important tweak to the established narrative: institutions (e.g. the Constitutional Court) that have been channeling (for populists distorting) the rule of law must be dealt with as expeditiously as possible. This is also where the unmitigated, almost sacred, will of the people becomes the true source of fear.

A populist constitution of fear: Reconstruction

The new brand of constitutionalism on the rise in Poland is defined by a „constitution of fear”. Fear is the leitmotif of the constitution-making process defined by suspicion, exclusion, drive for retribution and settling the scores. As such it reflects the main tenets of populist constitutionalism: distrust in the institutions and rejection of the liberal status quo and culture of self-constraints. As [argued by F. Schauer](#) with regard to the American Constitution, „a constitution of fear” fails to protect from new harms not contemplated by the Founders or protects us from harms that no longer exist. To these two imperfections one might add in the Polish context a zealous push to protect against the fake harms, dangers and imperfections that exist only in the paranoid minds of Polish constitution-makers.

„A constitution of fear” is not a one-off occurrence. Quite the contrary. It crowns [the politics of resentment](#). It becomes its manifesto. „A constitution of fear” is partisan as it only speaks to those whom it accepts as real people and who share the new „ideals”. All others are excluded and not welcome. „A Constitution of fear” is inward-looking. It protects national uniqueness and is read in direct opposition to the outside and always hostile world that is portrayed as a source of uncertainty at best, and decadence and fear, at worst. A „constitution of fear” is used as a defensive tool against all these dangers.

“A Constitution” of fear has a new role to play in the society. Instead of protecting an individual against the state, it elevates the community to the center stage and pushes the individual into the shadow of the state. While liberal constitutions put a premium on conflict management, inclusion, evolutionary (incremental) change that would be both open to diversity, and accommodate it as a social and normative fact, „a constitution of fear” thrives on disengagement and revolutionary tradition that builds on the avowed objective of clean slate and starting from zero and the drive to settle fundamental questions once and for all.

The safeguards typical of the constitutional liberal state (separation of powers and checks and balances, judicial independence) are a mere after-thought and are seen as an unwanted and unnecessary distortion of the smooth communication between the sovereign and its representatives. Procedure and safeguards only slow things down, make the process opaque and misunderstood by the people, and as such we must do away with all these liberal technicalities and inventions. Likewise, openness and inclusion are ridiculed and rejected. Exclusivity and instrumentalism become new names of the constitutional game.

If there is one common denominator, this is it: the political takes over the legal, with the latter harnessed to serve the former and the people being treated as a legal subject in its own right and with its own voice. It is the mono-ethnic and mono-cultural purified people, collectivity rather than individualism where open and participatory citizenship are concepts alien to the constitutional language of „a constitution of fear“. „A Constitution of fear“ is no longer a tool to protect citizens against the state. Rather it becomes a tool to entrench power and exclude dissent and to create a flattened and barren public sphere. It excludes any competition among possible constitutional ideologies and visions of the most desirable models of the state or even more: a populist constitution is fearful of even the slightest sign of variegation in channeling the popular will. „A constitution of fear“ transforms the rule of law from one of the cornerstones of a legal system into a mere technicality, seen as a nuisance in the process of extracting the true will of the people. Just like under the communist regime, the constitution becomes a political manifesto of power, not a safeguard against the arbitrary power.

A populist constitution of fear: Implementation

The constitutional narrative by the Polish ruling party is telling. The „grand“ conference in Gdansk in August 2017 under the auspices of President Duda laid bare the true intentions of the ruling party (for a prophetic voice see analysis of Professor W. Sadurski [here](#)). The conference was held under the catchy phrase „[Constitution for the people, not the elites](#)“ which in itself is indicative of the animus of suspicion and retribution that drives the minds and hearts of PIS-style constitutional design. For starters, the 1997 Constitution has been discredited as a „minority constitution“, even though the support for the Constitution (53,45%) surpassed the number of voters that supported Mr Duda in the presidential elections in 2015 (51.55%)! Following then Duda's skewed populist logic he is a minority president and must be replaced...

At the conference we got an amalgam of empty slogans (for my critique [see also here](#)) which make any reasonable discussion extremely difficult. Two examples of this pseudo-constitutional narrative: We are told that the socio-economic design needs a fundamental overhaul and that the social market economy as one of the foundations of the state (art. 20 of the 1997 Constitution) is an empty provision (why? how?), despite the fact that it balances freedom of commercial activity, private property, solidarity and social dialogue. The constitutional right to form trade unions is not respected and therefore must be spelt out differently etc. Constitutional gobbledygook in the hope that „the people will buy it“ and will not bother asking more arcane questions.

What is the remedy to all these constitutional evils? Of course, a new constitution. The old-new 2010 draft of the PIS Constitution leaves no doubt as to what the new constitution must and will look like, should PIS succeed in obtaining a [constitutional supermajority](#). Poland is presented as the unified state, fully sovereign, proud, always a taker, never a giver. Already the very first sentence of its Preamble (keep on reading, this is not a joke) puts any reasonable democrat on the alert: „In the name of the Almighty God, We Polish Nation, being thankful to the Divine Providence for the gift of independence and mindful of our over one-thousand history rooted in christianity“. This stands in stark contrast to today's version of 1997 Preamble „We the Polish Nation“ that welcomes and manages diversity as it includes all citizens of the Republic, not only those who trace their roots to christianity. The new axiology would be then further reflected in the oath of office: President, ministers and members of the parliament would be left with no choice whether to add or not „So help me God“. Separation of church and state will become illusory, and the constitution would guarantee the teaching of catholic religion in schools. This is only for starters, without even mentioning the weakened status of the judges (no more „separation and independence from other branches“) or wide-ranging power of the President to declare a state of emergency in case of a threat to the constitutional order. In the hands of crafty hands of J. Kaczynski and his cohorts, this will be certainly put to good use. Writing a constitution for ... new elites has just begun.

A Constitution of fear for a democracy on the periphery

“A constitution of fear“ entrenches unconstitutional capture. It stands as its final stage and most glorious moment of recapturing the state from corrupt and disgusting elites of the post-1989 phantom state. As the contours of „a constitution of fear“ become more and more visible, so does the concept of a new version of „democracy“ that such constitution will serve. The peripheral democracy represents a new brand or incarnation of democracy. It is based on 5 major claims that: (1) the 1989 transformation was not only politically, but also morally flawed; (2) the system as conceived in 1989 with the overarching rationale of rule of law served only the few, while leaving behind the many and, interconnected, (3) the institutional design favored the powerful („Wall Street“) while disadvantaging „Main Street“, (4) the political dominates over the legal, and finally and crucially, (5) a new system of governance and a novel constitutional design are needed, thus the concept of capture of the „bad“ state in order to create a new and more virtuous one with the constitution of fear as crowning the project. The element of periphery not only adds important insights into our understanding how democratic regime is captured, but also enables this very capture.

Democracy on the periphery is a besieged regime, always on the stand-by. It feeds off the politics of resentment which are inherently revolutionary: there is always „the insidious other“, and we must never let our guard down. „A constitution of fear“ institutionalises and entrenches this state of now „normal emergency“. „Democracy on periphery“ has a peculiar understanding of the constitution. Whereas the liberal democracy presupposes constitutional conflict (within the parameters of a legal system) over the values and vision of a state, the constitution of fear in a peripheral state closes off space for dissent and different voices. The former is based on the political, while the latter focuses on partisan. Competition and representation are understood differently: in the liberal democracy they are encouraged, on the periphery they are discouraged and waved off as there is always an exclusive claim to representation and voice. Only one voice. As a result, space for contestation is significantly reduced: acceptable arguments are predetermined, rather than worked out in the discursive framework and process, actors and public are exposed to one-sided version of the political. All „others“ are no longer objective opponents to be respected and disagree with, they become partisan adversaries, enemies of the new state and its constitution.

Importantly for my analysis, democracy on the periphery is counterfactual as it disregards the fact of deep division in societies and glides over it with dramatic consequences for the state and citizenry: suppression and a flattened vision of society. The Constitution ceases to reach out, rather it decides in a most authoritarian way what is right, what is good life, and chooses for everyone one and only world view. When all is said and done, a constitution takes backstage to the political process. It is reduced to a vehicle for good change, rather than a tool for managing diversity. This is exactly where Poland finds itself right now: building a groundwork for constitutional design around distrust, exclusion, retribution and anti-individualism. These are the contours for a new constitutional document in the making: „a constitution of fear“ for a peripheral democracy.

Liberal Constitution of Fear and ... Hope

Constitutional safe-guards will not do the trick unless they are backed up by strong civic activity, popular support for institutions and culture of restraint and self-imposed limitations. For aspiring autocrats and capture, there are no more terrifying and powerful opponents. The question has been asked on many occasions about a possible unifying factor against further encroachments of PIS. The 1997 Constitution is a document that serves an open society that is made up of many voices and faces. It is a document based on the rule of law, human dignity and tolerance for the other. As such, it has the potential of bringing together anti-PIS voices under one roof.

While fear acts as the source of empowerment for the constitution-makers, the perspective of the citizens is different, one of disempowerment. Indeed citizens should have their own fears of an emerging constitution of fear à la PIS. A constitution that sets the government free and leaves it unchecked must be feared, and yet, fear is not alien to democracy. As understood from the perspective of citizenry, fear here should be a powerful reminder why citizens should never approve a constitution that leaves them at the mercy of the majority and subjugates the individual to the communal, legal to the political. Here the dual nature of fear comes to the fore, and we must be clear about the kinds of fear we are talking about.

Democracy, when viewed negatively, is the least flawed among available regimes. It prevents, or at least minimizes the danger of bad results and „things going wrong“, more than securing good outcomes. That is why and rightly so democracies have their own constitution of fear. Yet, this democratic fear is understood differently from resentment-driven fear. Rather than removing safeguards and constraints, it disciplines the government and keeps it in check in case of a government going off the rails. „The democratic constitution of fear“ recognizes the inherent dangers of backtracking on the democratic promise, and to this end it institutes an elaborate system of checks and constraints, all to make sure that our fears of governmental excesses and tyranny of majority will never materialize. As opposed to populist fears, democratic fears call for more safeguards and checks and as such are nothing extraordinary. They follow the very logic of democratic government: in order to avoid arbitrariness each power must be checked and limited. In the constitutional world of PIS, though, fears are of a different kind and work in the opposite direction. Fears of the recurrence of the corrupt and morally unfit III. Republic, of the political correctness of the independent (seen as a vice) institutions, of the EU's final assault on the Poland's cherished sovereignty, they all call for more, not less concentration of power, for more control over people's lives and choices, more supervision-driven state institutions and one centralized narrative of what good life in a purified Polish nation should look like.

The drive not to repeat the mistakes of the past and/or safeguard us against the bad past and its present recurrence is not a negative emotion altogether. Rather, my point is that fear alone can only do so much. For any constitution to survive and sustain democracy in the long run, it must be complemented by something more promising, positive and forward-looking. Good constitutional design also needs HOPE that would be interwoven with FEAR. On the one hand, separation of powers and checks and balances, the constitutionalization of proportionality, a strong and independent judiciary are all fear-driven constraints. On the other hand, and in clear opposition to the populist constitution of fear, liberal constitution of fear puts stock in strengthening the safeguards, not limiting them, and that is the most important difference between two documents and their understanding of what fear entails for a constitution. The idea of open society, a comprehensive catalogue of human rights, dignity of each human being, tolerance for „the other“ and his difference, and finally openness to and curiosity of the world, are all staples of a constitution of hope.

KONS-TY-TUC-JA

Only when a constitutional document succeeds in bringing together FEAR and HOPE and strives to reflect and ordain both, it becomes a balanced Constitution. The evocative poster that became symbol of protests in Poland in July 2017 in defense of the independent judiciary read „KONS-TY-TUC-JA“ where „TY“ stands in Polish for „YOU“ and „JA“ for „ME“. Indeed the survival of our [1997 Constitution of hope](#) depends now exclusively on „ME“ and „YOU“. The stakes could not be higher: true constitutional reckoning has arrived.

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SUGGESTED CITATION Koncewicz, Tomasz Tadeusz: *A Constitution of Fear*, *VerfBlog*, 2017/11/16, <http://verfassungsblog.de/a-constitution-of-fear/>, DOI: <https://dx.doi.org/10.17176/20171116-095138>.